Supreme Court, U.S.
FILED

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GORDON W. ROGERS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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32 pp

EDITOR'S NOTE

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QUESTIONS PRESENTED FOR REVIEW

Whether a Court of Appeals can lawfully dismiss an appeal without hearing or consideration of the merits, for nonpayment of a sanction ordered by the court in a previous partially related case, when

(1) the previous case was not completely heard due to withheld documentation;

(2) documentation had been submitted which would affect the judgment of both cases;

(3) the cases had different essential key issues; and

(4) the grounds for dismissal conflict with rulings of Courts of Appeal for other circuits.

PARTIES TO THE PROCEEDING

Parties to this proceeding are:

Gordon W. Rogers
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Everett, Washington 98203,

a private individual, Petitioner In Propria Persona,

versus

United States of America,

Internal Revenue Service,

District Director of Internal Revenue, Respondents, represented by

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Seattle, Washington 98104,

and

Gary R. Allen, Chief, Appellate Section, Tax Division
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TABLE OF CONTENTS

Page

OPINIONS DELIVERED ---------- 8

STATEMENT OF JURISDICTION ---------- 10

CONSTITUTIONAL PROVISIONS INVOLVED ---- 13

STATEMENT OF THE CASE ---------- 14

Jurisdiction of court of first instance 18

ARGUMENT ---------- 19

Summary ---------- 19

DISCUSSION ---------- 21

I. THE CASES AT ISSUE WERE NOT FULLY HEARD. ---------- 21

II. ADDITIONAL DOCUMENTATION WOULD HAVE AFFECTED THE DECISION OF BOTH CASES 23

III. THE CASES AT ISSUE WERE ESSENTIALLY DISSIMILAR. ---------- 27

IV. THE SAID DISMISSAL BY THE NINTH CIRCUIT CONFLICTS WITH THE RULINGS OF SEVERAL OTHER CIRCUITS. ------- 29

Second Circuit ---------- 32
Third Circuit ---------- 33
Fourth Circuit ---------- 33
Fifth Circuit ---------- 34
Tenth Circuit ---------- 35
Eleventh Circuit ---------- 36

CONCLUSION ---------- 37

RELIEF SOUGHT ---------- 38

Signature of Petitioner ---------- 39

APPENDICES:

A. Ninth Circuit Memorandum Dismissal 40

B. District Court Order ---------- 42

C. Ninth Cir. denial of rehearing -- 49

D. Ninth Cir. Entry of Dismissal --- 50

TABLE OF AUTHORITIES

Page

Cases:

Armstrong v *Manzo*, 380 US 545, 552 (1965) ---------- 26

Aztec Steel Co. v *Florida Steel Corp.*, 691 F.2d 480 (11th Cir. 1982) --------- 36

Baltimore & O. R. Co. v *U. S.*, 298 US 349, 368-9 (1936) ---------- 25-26

Bell v *Burson*. 402 US 535, 542 (1971) - 26

Bush v. *United States Postal Service*. 496 F.2d 42 (4th Cir. 1974). ---------- 34

Duchardt v. *Ewing*. 571 F.2d 869, 870 (5th Cir.1978) ---------- 13, 35

Dyotherm Corp. v *Turbo Machine Co.*, 392 F.2d 146, 148 (3d Cir. 1968) ---------- 33

E.E.O.C. v *Troy State University*. 693 F.2d 1353, 1357-8 (11th Cir. 1983) - 35, 36

Flaska v *Little River Marine Construction Co.*. 389 F.2d 885,887 (5th Cir. 1968) - 35

Gill v *Stolow*. 240 F.2d 669 (2d Cir. 1957) ---------- 32

Independent Productions Corp. v *Loew's Inc.*, 283 F.2d 730, 733 (2d Cir. 1960) - 32

Jones v *Louisiana State Bar Assn.*, 602 F.2d 94 (5th Cir. 1979) ---------- 36

Link v *Wabash RR Co.*, 1962, 370 U.S.626 33

Logan v *Zimmerman Brush Co.*, 455 US 442, 437 (1982) ---------- 27

Lyell Theatre Corp. v *Loew's Corp.*, 682 F2d 37, 42, 43 (2d Cir. 1982) --------- 32

Marshall v *Segona*, 621 F.2d 763 (5th Cir. 1980) ---------- 34

Matheny v *Porter*, 168 F.2d 478, 480 (10th Cir. 1946) ---------- 35-36

McCargo v. *Hedrick*, 545 F.2d 393 (4th Cir. 1976) ---------- 34

Meeker v *Rizley*, 10 Cir 1963, 324 F.2d 269 ---------- 33

Mullane v. *Central Hanover Bank*, 339 US 306, 313 ---------- 26

National Hockey League v *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 -- 32

Powell v *Alabama*, 287 US 45, 68 (1932) - 26

Producers Releasing Corp. de Cuba v *PRC Pictures*, 176 F.2d 93 (2d Cir. 1949) --- 32

Reizakis v *Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974) ---------- 33

Syracuse Broadcasting Corp. v *Newhouse*, 271 F.2d 910, 914 (2d Cir. 1959)------- 32

Thielman v *Rutland Hospital, Inc.*, 455 F.2d 853, 855 (2d Cir. 1972) ---------- 32

Thomas v *Arn*, 474 US 140, 155 (1985) -- 27

United Artists Corp. v *Freeman*, 605 F.2d 854,856 (5th Cir. 1979) ---------- 34

United States v. *Coson*, 286 F.2d 453, 455 (1961). ---------- 9, 15

Weidenfield v *Pacific Improvement Co.*, 101 F.2d 699, 700 (2d Cir. 1939) --- 32-33

Wrenn v *American Cast Iron Pipe Co.*, 575 F.2d 544, 546 (5th Cir. 1978) ------ 34-35

TABLE OF AUTHORITIES (Continued)

Statutes:

26 USC § 6203 ---------- 23

26 USC § 6501(a) ---------- 24

26 USC § 6702 ---------- 21

28 USC § 1254(1) ---------- 10

28 USC § 1340 ---------- 18

28 USC § 2101(c) , (e) ---------- 11

28 USC § 2410 ---------- 9, 17, 18, 19

TABLE OF AUTHORITIES (Continued)

Regulation 26 CFR § 301.6203-1 -------- 24

Court Rules:

10(a) and(c), Supreme Court ---------- 10

11, Supreme Court ---------- 11

13.1 and 13.4, Supreme Court ---------- 10

OPINIONS DELIVERED

A. Opinions by the Court of first instance (U.S. District Court for Western District of Washington):

1. "All defendants in this action are protected by the sovereign immunity of the United States."

2. "Rogers cannot bring such a claim under section 2410 because a `taxpayer may not use a § 2410 action to collaterally attack the merits of an assessment.'"

3. "Justice would not be served in this case by allowing an amendment."

B. Opinion of the court of second instance (U. S. Court of Appeals for the Ninth Circuit):

"Courts have inherent power to dismiss actions for nonpayment of cost ... [including] a litigant's failure to pay

previously imposed sanctions."

Petitioner's Comments on the Above:

1. Defendants, employees and officials of the United States of America, are not protected by sovereign immunity when they violate statutes.

2. Claims under 28 USC § 2410 alone have been honored, per ruling of the Court of Appeals for the Ninth Circuit, *United States v. Coson*. 286 F.2d 453, 455 (1961).

3. That "justice would not be served by allowing an amendment" was a pre-judgment. The judge had not read the amendment.

4. Opinion B is the issue of this Petition for Certiorari.

STATEMENT OF JURISDICTION

The order sought to be reviewed was filed in the United States Court of Appeals for the Ninth Circuit on October 21, 1993, in the form of a Memorandum dismissal not for publication. A Petition for Rehearing was filed on November 2, 1993. To date of the original writing of this Petition no disposition of same had been received by the Petitioner. A denial of the rehearing without explanation was filed on January 20, 1994.

Jurisdiction of the Supreme Court over this case is conferred by 28 USC § 1254(1) and by Rules 10(a) and(c) of the Rules of the Supreme Court of the United States, which permit review of decisions of a U.S. Court of Appeals which conflict with other courts of appeals on the same matter.

This application for a writ of

certiorari is permitted by 28 USC § 2101(c) and Supreme Court Rules 13.1 and 13.4 when filed within 90 days after entry of denial of a petition for rehearing in the Court of Appeals. It is also permitted by § 2101(e) and Supreme Court Rule 11 at any time before judgment.

Grounds for requesting review prior to final judgment by the Court of Appeals were as follows:

This case has been dismissed for nonpayment of a sanction ordered in the judgment of a previous case. The previous case was incompletely heard and its judgment was based upon unfounded presumptions. Payment of the sanction was deferred pending reconsideration on a motion which was never answered. Dismissal was grounded on a type of premise, which at the Court's discretion could be adapted for use in virtually any

circumstance for disposing of a case whose issues the court might wish to avoid. Issues which might be embarrassing to government but protective of constitutionally secured personal rights are particularly vulnerable to such abuse. The practice is also repugnant to the American standard of justice, as demonstrated by rulings of other Circuit Courts of Appeals. It is imperative, therefore, that the dismissal of cases without full hearing on all the evidence and merits not be allowed to prevail for less than extraordinarily commanding reasons.

In an example of conduct more vexatious by a party than this one, the case was dismissed for noncompliance with a court order. The Court of Appeals for the Fifth Circuit vacated and remanded that decision

with this comment:

> "Such procedural ineptitude should not forfeit a litigant's right to appeal an issue that has at least colorable merit. Duchardt would lose this right forever if the present dismissal were affirmed." *Duchardt v. Ewing*, 571 F.2d 869, 870 (5th Cir. (1978).

The same is true of the case here.

Thus, protection of the public interest and personal rights is the prime motivator of this Petition for Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Fifth Amendment:

> **"No person shall be ... deprived of ... property, without due process of law."**

In this case the issue is liens against property owned by the Petitioner and held by the United States without procedural propriety; and dismissal of the appeal of this issue By the Court of Appeals without hearing or consideration of the merits, and without a complete hearing by the

court below.

The Constitutional guarantee of due process of law has not been knowingly or intentionally waived by the Petitioner.

STATEMENT OF THE CASE

On August 1, 1991, Petitioner filed a Complaint in U.S. District Court for the Western District of Washington (Civil docket No. C91-1072-D), for "Discharge of Property from Lien Held by United States for Return Penalties Illegally Assessed."

Jurisdiction of the said court of first instance was conferred by 28 USC § 2410, which provides that the United States may be named a party in any civil action to quiet title to real or personal property on which the United States holds a lien. Jurisdiction was further conferred by 28 USC § 1340 by implication,

United States v. Coson, 286 F.2d 453, 455 (9th Cir. 1961), which Ninth Circuit precedent confers jurisdiction of such a case on the basis of 28 USC § 2410 alone.

However, the Complaint was dismissed by the District Court on November 21, 1991, on ground that § 2410 did not confer jurisdiction. A motion to vacate judgment was subsequently filed and was dismissed on April 8, 1992.

The case was then appealed to the U.S. Court of Appeals for the Ninth Circuit, with a brief being filed on September 18, 1992. Without a hearing or consideration of the merits, the case was dismissed October 21, 1993, on ground that Petitioner had failed to pay a sanction assessed in a previous case. As a consequence thereof, this Writ of Certiorari is filed for addressing the question of whether a court can lawfully

use such grounds for refusing to hear an appeal. The Appeals Courts of other circuits have ruled to the contrary.

IN BACKGROUND, notices of deficiency in income taxes were issued to the petitioner for year 1987 on April 27, 1990, and for 1985 and 1986 on July 20, 1990, in the absence of any amounts of tax being determined by the Petitioner; without examination of a return made by a taxpayer; in lack of any known evidence of a tax-generating activity; in the absence of any assessment of tax; and after expiration of the three-year statute of limitations for a lawful assessment of taxes for years 1985 and 1986. For these reasons the Petitioner believed the notices of deficiency to be invalid and therefore outside the jurisdiction of the United States Tax Court. Consequently he

did not petition the Tax Court, but responded by letters of explanation and requests for substantiation of "taxpayer" status, which the Commissioner never answered.

On June 8, 1990, Petitioner executed a formal, fully documented, Affidavit of Revocation and Rescission in which he revoked all his signatures and declared void all documents which might have subjected him to a federal income tax by deception.

On April 22, 1991, the Commissioner imposed a lien for $15,250 against the Petitioner's property for 1987 alleged taxes and penalties, followed by a levy for $17,144 on May 14, 1991. Then on July 26, 1991, another lien was imposed for $45,043 and a levy for $46,365, both covering alleged taxes for 1985 and 1986.

Meanwhile, Petitioner had filed on May

6, 1991, an Administrative Appeal of Filing of Federal Tax Lien and Application for Release of Federal Tax Lien, to which the Commissioner has never responded.

Petitioner also filed an administrative request for a compromise hearing on September 21, 1992. The Commissioner did not disclose any Treasury Regulation or statute which would impose a tax on the Petitioner, nor identify the specific type of tax to which he was allegedly subject, even after Petitioner's request for such information. Therefore the Petitioner was unable to complete the Form 656 which required identification and description of the type of tax and the specific tax liability at issue. Consequently no administrative hearing was held.

Petitioner then filed a complaint in the District Court for the Western District of Washington with the results noted above.

ARGUMENT

SUMMARY:

1. The Court of first instance did not completely hear the case. It denied entry of an amended complaint without reading it. It disclaimed jurisdiction under 28 USC § 2410 even though the Appeals Court in its own circuit had ruled that § 2410 does confer jurisdiction. It misconstrued the case by basing judgment on a presumed tax assessment where no tax had been assessed, and did not deal with the issues of the complaint. Thus the Petitioner was not accorded due process of law by the District Court. He appealed to the Ninth Circuit.

2. A prior case before the Appeals Court with different, but overlapping, issues had not been properly settled, as certain key issues had not been considered and judged upon. Thus due process of law

had not been accorded, and Petitioner moved for reconsideration which to his knowledge remained pending. For that reason a sanction ordered by the Court had not been paid.

3. The Appeals Court dismissed the latter case for failure to pay the sanction ordered in the prior case, even though the Court had received additional supporting documentation that no taxes had been assessed and no taxable base indicated. Thus due process of law was denied by refusal to hear arguments on the merits.

4. Dismissal for failure to pay the said sanction conflicts with rulings by other Circuit Courts of Appeal and by the Supreme Court.

Therefore:

(a) Due process of law has been denied; and

(b) The Appeals Court abused its discretion.

DISCUSSION:

I. THE CASES AT ISSUE WERE NOT FULLY HEARD.

In 1991 this Petitioner's first case was appealed to the Ninth Circuit Court of Appeals in which the relief requested was return of funds seized by the Commissioner of Internal Revenue as penalties for "frivolous income tax returns" under 26 USC § 6702. At issue was whether penalties could be charged in absence of (1) a self-assessment of tax; (2) any tax assessment; and (3) evidence that the income in question was taxable and

therefore that a return was required. The complaint was dismissed on grounds which were irrelevant to these points at issue. Subsequently, upon appeal the Appeals Court affirmed the decision of the lower court, overlooking these same points at issue. A petition for rehearing and a motion to stay mandate were denied without explanation. A sanction was assessed. A final motion to reconsider was submitted pointing out that a key issue had not been ruled upon. No disposition of this motion was received by the Petitioner; consequently he assumed that it remained pending and he deferred payment of the sanction.

In short, the case was never really settled, because neither court dealt with the basic points at issue. In other words, not all the evidence and arguments were heard, and judgment was rendered on

ancillary or irrelevant points. Thus due process of law was denied.

Furthermore:

II. ADDITIONAL DOCUMENTATION WOULD HAVE AFFECTED THE DECISION OF BOTH CASES.

On June 28, 1993 the Petitioner received from the Internal Revenue Service a packet of "IMF MCC Transcripts-IMF Literal" covering the years 1985-1988. The cover letter accompanying same declared that the documents "comply with Internal Revenue Code (IRC) Section 6203;" in other words, that they were the official "copy of the record of the assessment" as provided for by that statute.

On August 10, 1993, a copy of said packet of documents was sent by the Petitioner to the Ninth Circuit Court of Appeals in response to its letter inviting

"additional citations" relative to the second of the two cases at issue here. As explained by an analysis in Petitioner's cover letter accompanying same, the documents showed that no taxes had been assessed for any of the years shown, and that foundation was lacking for any "additional tax," or penalties or interest, that supporting records required by regulation 26 CFR § 301.6203-1 were missing, that the character of the liability was not shown as required by the same regulation, and that all of the amounts shown for the years 1985 and 1986 were entered after expiration of the statute of limitations set forth by statute in 26 USC § 6501(a).

The nature of the documentation should make it clear that in the absence of any tax assessment or evidence of liability

for a tax, no penalties of any kind could be lawfully charged as was done in both of the two cases at issue here. Thus, the said documents should have enabled immediate settlement of both cases. Instead, the second case was dismissed on October 21, 1993, for failure to pay the $1500 sanction assessed in the previous case, even though said documentation was received by the Appeals Court ten weeks prior to dismissal of the case.

Wherefore, due process of law was denied not only by incomplete hearing of the first case, but also by exclusion of evidence from the second case. Such action is proscribed by the following rulings of the Supreme Court of the United States:

> "The Due Process Clause assumes a <u>full hearing</u> before the court or other tribunal empowered to perform the judicial function involved. That includes the <u>right to introduce evidence</u> and to have judicial findings based upon it." [12 citations omitted

here. Emphasis added.] *Baltimore & O. R. Co. v United States*, 298 US 349, 368-69 (1936).

"The hearing required by due process must be 'meaningful,' *Armstrong v Manzo*, 380 US 545, 552 (1965), and 'appropriate to the nature of the case, *Mullane v. Central Hanover Bank & Tr. Co.*, [339 US 306] at 313. It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision ... does not meet this standard." *Bell v Burson*, 402 US 535, 542 (1971).

"... [T]he rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so." *Powell v Alabama*, 287 US 45, 68 (1932).

Petitioner submits that the last of the three foregoing quotations confirms that nonpayment of the said sanction was

justified. However, it was paid under protest on the 24th day of November, 1993.

It might also be enlightening to contrast the said Ninth Circuit's dismissal with the following:

> "'Litigants subject to the Sixth Circuit's rule are afforded 'an *opportunity* ... granted at a meaningful time and in a meaningful manner' [*Logan v Zimmerman Brush Co.*, 455 US 442, 437 (1982)], quoting *Armstrong v Manzo*, 380 US 545, 552 (1965), to obtain a hearing by the Court of Appeals.'
>
> "This Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest [3 Citations]. The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society [citation]." *Thomas v Arn*, 474 US 140, 155 (1985).

III. THE CASES AT ISSUE WERE ESSENTIALLY DISSIMILAR.

The two cases at issue here shared similarities of having the same plaintiff

and defendant, involving the same time periods of 1985 and 1986, and similar issues of whether or not certain receipts constituted taxable income; the definition of "deficiency;" and requests for similar temporary injunctions to restrain unauthorized and unsubstantiated collections. There the similarities ended.

The other issues of the first case were mutilation of tax returns by government employees, a deposit construed as payment of a tax, presumption of liability not substantiated, and penalties for "frivolous returns" being construed as taxes.

The other issues of the second case were lack of notification or evidence that a tax return was required, and unlawful assessment of penalties for negligence, late filing, and fraudulent reporting in the absence of any accepted returns.

It should be clear therefore, that the two cases had enough dissimilarities to set them apart as being separate and independent actions.

IV. THE SAID DISMISSAL BY THE NINTH CIRCUIT CONFLICTS WITH THE RULINGS OF SEVERAL OTHER CIRCUITS.

The records and the foregoing discussions should make clear the following differences between the two cases here at issue:

(1) The first case involved property losses totalling approximately $3,000, whereas the second involved losses in excess of $64,000, over 21 times as much, plus a potential for greater loss through foreclosure of liens and sale of property at less than market value.

(2) The major issues of the first case were penalties for alleged frivolous income tax returns and failure to refund a

small deposit against future taxes, whereas the major issues of the second case were penalties for allegedly false reporting and liens against the plaintiff's entire estate.

(3) Both cases, far from being "frivolous," "vexatious" or "contumacious" were well grounded on fact, statute law and case law.

Dismissal of the second case at issue here for non-payment of a sanction assessed in the first case was enunciated by the Court of Appeals as follows:

> "Previously, in a case similar to this appeal, we sanctioned Rogers $1500 for filing a frivolous appeal in which he sought to enjoin the Internal Revenue Service from attempting to collect unpaid income tax and penalties. See Rogers v. United States, No. 91-35132, unpublished memorandum (9th Cir. Feb. 3, 1992). It appears that Rogers has failed to pay the assessed sanction. Accordingly, we dismiss this appeal for failure to comply with this court's previous order." *Memorandum disposition* of Case No. 92-35444,

filed Oct. 21, 1993, in Court of Appeals for the Ninth Circuit.

It is also pertinent to this issue to note that the relief sought was misconstrued by the Court. Rogers did not seek to enjoin the collection of any tax. The phrase "unpaid income tax" in the foregoing quotation is inaccurate and misleading. Truth would be more accurately expressed by such terminology as unauthorized, or unsubstantiated, or unassessed income taxes. Dismissal prevented Rogers (the Petitioner here) from having the record corrected, not only for this error but for other errors based on unfounded presumptions which would have been refuted by the documentation mentioned, supra, which was secreted by the defendant but submitted by the appellant ten weeks before dismissal.

The circumstances preceding the

dismissal having been described, supra, it remains only to see how that action by the Ninth Circuit conflicts with the following rulings of other circuits:

Second Circuit:

> "Sanctions must be determined in light of the full record in the case. *National Hockey League v Metropolitan Hockey Club Inc.*, 427 U.S. 639, 642 . . ." *Lyell Theatre Corp. v Loew's Corp.*, 682 F2d 37, 42, 43 (2d Cir. 1982).
>
> "Dismissal with prejudice is a harsh remedy to be used only in extreme situations." *Lyell Theatre Corp.*, Id.; *Thielman v Rutland Hospital, Inc.*, 455 F.2d 853, 855 (2d Cir. 1972); *Gill v Stolow*, 240 F.2d 669 (2d Cir. 1957); *Producers Releasing Corp. de Cuba v PRC Pictures*, 176 F.2d 93 (2d Cir. 1949); *Syracuse Broadcasting Corp. v Newhouse*, 271 F.2d 910, 914 (2d Cir. 1959); *Independent Productions Corp. v Loew's Inc.*, 283 F.2d 730, 733 (2d Cir. 1960).
>
> "The stay [of a second action by the same plaintiff] was granted in accordance with a well settled practice whereby a second action cannot be maintained for substantially the same relief asked for in a prior action until the costs of the first action have been paid [1 federal and 5

state citations] . This practice was designed to prevent oppressive and vexatious litigation and also to enable a party who has recovered costs to obtain payment before being subjected to further litigation relating to the same subject matter." *Weidenfield v Pacific Improvement Co.*, 101 F.2d 699, 700 (2d Cir. 1939). Emphasis added.

Third Circuit:

"Dismissal is a harsh sanction which should be resorted to only in extreme cases. The power of the court to prevent undue delays and to control its calendar must be weighed against the policy of law which favors disposition of litigation on its merits. Link v Wabash RR Co., 1962, 370 U.S. 626 ... ; Meeker v Rizley, 10 Cir 1963, 324 F.2d 269." *Dyotherm Corp. v Turbo Machine Co.*, 392 F.2d 146, 148 (3d Cir. 1968).

Fourth Circuit:

"In deciding whether a case should be dismissed, a district court must consider conflicting policies: '[a]gainst the power to prevent delays must be weighed the sound public policy of deciding cases on their merits.' *Reizakis v Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974).

In *Reizakis* this court listed factors that must be taken into consideration in determining whether dismissal was proper under Rule 41(b). [Footnote omitted.] First is the

degree of personal responsibility on the part of the plaintiff. Dismissal should be ordered ``only in the face of a clear record of delay or contumacious conduct by the plaintiff.'' 490 F.2d at 1135. Second is the amount of of prejudice to the defendant caused by the delay. ... [A]lso ... whether the record indicated a `drawn out history' of `deliberately proceeding in a dilatory fashion' and whether the trial court had considered sanctions less drastic than dismissal. To the same effect is *Bush* v. *United States Postal Service*, 496 F.2d 42 (4th Cir. 1974)." *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976).

Fifth Circuit:

"But we have also recognized that dismissal is too harsh a sanction where a number of factors, singly or in combination, are present ... First, dismissal is to be sparingly used and only in situations where its deterrent value cannot be substantially achieved by use of less drastic sanctions. [4 citations.] ...

"Nor does a party's simple negligence, grounded in confusion or sincere misunderstanding of the court's orders, warrant dismissal. [*United Artists Corp.* v *Freeman*, 605 F.2d 854,856 (5th Cir. 1979)]" *Marshall v Segona*, 621 F.2d 763 (5th Cir. 1980).

"This court has indicated that a

dismissal under F.R.Civ.P. 41(b) for failure to comply with an order of the district court is appropriate only where there is a clear record of delay or contumacious conduct and lesser sanctions would not serve the best interest of justice." *Wrenn v American Cast Iron Pipe Co.*, 575 F.2d 544, 546 (5th Cir. 1978).

"The extreme sanction of dismissal with prejudice, however, is not warranted in this case ... His fault was in attempting to advance his contention by an improper appeal rather than a proper reiteration of his challenge to the district court. Such procedural ineptitude should not forfeit a litigant's right to appeal an issue that has at least colorable merit." *Duchardt v Ewing*, 571 F.2d 869, 870 (5th Cir. 1978).

"Dismissal of an action with prejudice and entry of judgment by default are drastic remedies which should be used only in extreme situations." *Flaska v Little River Marine Construction Co.*, 389 F.2d 885,887 (5th Cir. 1968).

Tenth Circuit:

"The court had power to discipline the defendant for failing to comply with the pretrial conference order. And in the exercise of that power, the court was clothed with reasonable discretion in determining what measure of discipline was appropriate and should be imposed. The court might

well have required the defendant to pay all costs incurred . . or might well have imposed some other reasonable exaction. The withdrawal from defendant of the right to introduce any evidence in his own behalf bearing upon the issues of fact in the case seems drastic. . . . If the complaint is amended in a manner to overcome the defect the defendant doubtless will promptly write the letter required by the pretrial conference order. . . . And there is nothing in the record to indicate that the defendant will again be denied the right to introduce evidence in his own behalf. * * *

"The judgment is reversed and the cause remanded." *Hathenv v Porter*, 158 F.2d 478, 480 (10th Cir. 1946).

Eleventh Circuit:

"Dismissal will not be upheld if a party's failure to comply is due to inability rather than to willfulness, bad faith or disregard of responsibilities. *Jones v Louisiana State Bar Assn.*, 602 F.2d 94 (5 Cir. 1979). . . . In reviewing the district court's ruling one consideration is whether a less drastic but equally effective remedy could have been fashioned. *Jones v La.* Id. at 97." *Aztec Steel Co. v Florida Steel Corp.*, 691 F.2d 480 (11th Cir. 1982).

"Dismissal is generally proper only where less drastic sanctions cannot substantially accomplish its purpose.

... See *Astec Steel Co.*, [Id.] at 481-82." *E.E.O.C. v Troy State University*, 693 F.2d 1353, 1357-8 (11th Cir. 1983).

CONCLUSION

The foregoing statements and arguments should make clear the following salient points:

1. The second case at issue here was dismissed for nonpayment of a sanction ordered in the prior case which had not been fully heard; which was affected by documentary evidence secreted by the defendant and later obtained by the Petitioner; and whose judgment was affected by one or more misconstructions of fact.

2. Dismissal prevented re-opening the first case for correction of errors and consideration of additional evidence, and precluded hearing the second case at

all.

3. Dismissal, therefore, deprived Petitioner of his Constitutional right to due process of law.

4. The dismissal contravened prior rulings of at least six other Circuit Courts of Appeals.

RELIEF SOUGHT

For the foregoing reasons, the Petitioner prays the Supreme Court to grant certiorari so as to reverse the rulings and to remand both cases for hearings consistent with due process of law and the generally established practice of American jurisprudence.

RESPECTFULLY RE-SUBMITTED this 4th day of February, 1994

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APPENDIXES

APPENDIX "A"

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-35444
D.C. NO. CV-91-1072-CRD

GORDON W. ROGERS,
Plaintiff-Appellant

v.

UNITED STATES INTERNAL REVENUE SERVICE;
DISTRICT DIRECTOR;
UNITED STATES OF AMERICA,
Defendants-Appellees.

MEMORANDUM[1]

Appeal from the United States District Court for the Western District of Washington, Carolyn R. Dimmick, District Judge, Presiding

Submitted October 6, 1993[2]
Before: BEEZER, KOZINSKI, and KLEINFIELD, Circuit Judges.

Previously, in a case similar to this appeal, we sanctioned Rogers $1500 for filing a frivolous appeal in which he

[1] This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. Fed.R. App. P. 34(a); 9th Cir. R. 34-4.

sought to enjoin the Internal Revenue Service from attempting to collect unpaid income tax and penalties. See Rogers v. United States, No. 91-35132, unpublished memorandum (9th Cir. Feb. 3, 1992). It appears that Rogers has failed to pay the assessed sanction. Accordingly, we dismiss this appeal for failure to comply with this court's previous order. See Hymes v. United States, 993 F.2d 701, 701-02 (1993) ("courts have inherent power to dismiss actions for nonpayment of cost ...[including] a litigant's failure to pay previously imposed sanctions") (citations omitted).

DISMISSED.

APPENDIX "B"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C91-1072D

GORDON W. ROGERS,
Plaintiff,
v.
UNITED STATES OF AMERICA, et al.,
Defendants.

ORDER

THIS MATTER comes before the Court on the motions of plaintiff for default and demand for judgment, for injunctive relief, and for leave to amend, and on the motion of defendants to dismiss. The Court having considered the briefs of the parties, hereby grants the motion of defendants to dismiss, and denies or declines to decide all motions brought by plaintiff.

BACKGROUND

Plaintiff Gordon W. Rogers filed a

"Complaint for Discharge of Property from Lien Held by the United States for Return Penalties Illegally Assessed." He brought this action under 28 U.S.C. § 2410.[3] The crux of his claim is that the Internal Revenue Service wrongfully assessed tax penalties against him, and therefore any liens on his property should be quashed. Rogers admits that he did not file any tax returns for the years 1986 through 1987.

DISCUSSION

A. Motion to Dismiss

The government argues that Rogers' complaint should be dismissed because it fails to state a claim for which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). This argument is well

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[3] 28 U.S.C. § 2410 provides in part: [T]he United States may be named a party in any civil action or suit in any district court; or in any state court having jurisdiction of the subject matter—

(1) to quiet title to ...real or personal property on which the United States has or claims a mortgage or other lien.

supported, and so the Court must dismiss plaintiff's complaint.

In addition to the United States of America, Rogers has named as defendants the Internal Revenue Service (IRS) and the District Director of the IRS. All defendants in this action are protected by sovereign immunity of the United States. Gilbert v Dubrossa, 756 F.2d 1455, 1458-59 (9th Cir. 1985); Blair v. United States Treasury Dept., 596 F.Supp. 273, 278-79 (N.D. Ind. 1984).

In this case, the United States has not waived its sovereign immunity to a suit brought pursuant to 28 U.S.C.§ 2410, because the suit is aimed at attacking the merits of a tax assessment. As there is no waiver of sovereign immunity, the Court must dismiss the complaint.

The United States may be sued only to the extent that it expressly has consented

to be sued. Id. at 1458. A taxpayer who brings an action against the United States consequently must find an express waiver of sovereign immunity that allows his action. Lonsdale v. United States, 919 F.2d 1440, 1444 (10th Cir. 1990). In this action Rogers has not identified any express waiver. The theory of his complaint is that the IRS wrongfully assessed return penalties for the years he did not file, and so any liens intended to collect these penalties must be invalidated. Rogers cannot bring such a claim under section 2410 because a `taxpayer may not use a § 2410 action to collaterally attack the merits of an assessment. Rather, the taxpayer may only contest the procedural validity of a tax lien." Elias v. Connet, 908 F.2d 521, 527 (9th Cir. 1990) (citations omitted).

In the present case Rogers collaterally

attacks the merits of the penalty assessment, but he does not challenge any of the procedural aspects of the liens.[4] Thus Rogers cannot state a claim under section 2410, and he cannot benefit from the government's waiver of sovereign immunity to be sued under that statute. As a result his complaint must be dismissed for failure to state a claim upon which relief can be granted. Gilbert, 756 F.2d at 1458.[5]

B. Motion for Default and Demand for Judgment and Motion for Injunctive Relief

[4] Plaintiff argues that he is not attacking the merits of his tax assessment, but only the assessment of penalties and interest. This does not make a difference, however, because the imposition of penalties and interest is a component of a tax assessment.

[5] It should also be noted that Rogers is precluded from a direct challenge to his assessment in Tax Court, or by way of a refund suit under 26 U.S.C. 7422. Rogers has admitted that he did not petition the Tax Court after he received notice of deficiencies, and unless he pays the assessed penalties and files a claim for a refund the Court would not have any jurisdiction over his challenge to the merits of the assessments. United States v. Freedman, 444 F.2d 1387, 1388 (9th Cir. 19781).

The government properly responded to Rogers' complaint with its motion to dismiss prior to October 31, 1991 as allowed by the Court's October 30, 1991 Order extending time. Thus Rogers motion for default and demand for judgment must be denied. The dismissal of Rogers' complaint has made his motion for injunctive relief moot, and so the Court declines to reach that issue.

C. Leave to Amend

Rogers has also filed a motion requesting that he be given leave to amend his complaint. While the Court recognizes the difficulties facing a pro se plaintiff, justice would not be served in this case by allowing an amendment. Rogers has given no indication how his complaint could be amended to same his claim. Moreover, because a challenge to

the merits of a tax assessment cannot be made pursuant to 28 U.S.C. § 2410. and because the government has not waived its sovereign immunity for such an action, the Court cannot see how plaintiff could amend his complaint under this statute to state a claim for which relief could be granted.

THEREFORE, defendant United States' motion to dismiss Rogers' complaint is GRANTED. His complaint is dismissed with prejudice. Further, Rogers' motion for default and demand for judgment, and his motion for leave to amend are DENIED. The Could declines to reach Rogers' motion for injunctive relief.

The Clerk of the Court is directed to send copies of this order to pro se plaintiff and to all counsel of record.

DATED this 21st day of November, 1991.

(s) CAROLYN R. DIMMICK
United States District
Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JAN 20 1994

GORDON W. ROGERS,
Plaintiff-Appellant

v.

UNITED STATES INTERNAL REVENUE SERVICE; DISTRICT DIRECTOR; UNITED STATES OF AMERICA,
Defendants-Appellees

No. 92-35444
D.C. No. CV-91-1072-CRD
Western Washington
(Seattle)

ORDER

Before: BEEZER, KOZINSKI, and KLEINFELD, Circuit Judges.

The petition for rehearing is denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 92-35444
CT/AG#: CV-91-1072-CRD

ENTERED
ON DOCKET
FEB 02 1994
By Deputy /s/ MG

GORDON W. ROGERS
Plaintiff-Appellant

v.

UNITED STATES INTERNAL REVENUE SERVICE;
DISTRICT DIRECTOR;
UNITED STATES OF AMERICA
Defendants-Appellees

APEAL FROM the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court.

that the appeal from the judgment of the said District Court in this cause be, and hereby is DISMISSED.

Filed and entered: 10/21/93